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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1892.

No. 47.

GEORGE H. HILTON,
Appellant,

vs.

JAMES E. JONES, JOHN HILTON, THOMAS W. LOWREY ET AL.,
Appellees.

Appeal from the Circuit Court of the United States for the District of Nebraska.

BRIEF AND ARGUMENT FOR APPELLANT.

S. S. GREGORY,
WILLIAM M. BOOTH and
JAMES S. HARLAN,
SOLICITORS FOR APPELLANT.

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This is an appeal from a decree of the Circuit Court of the United States for the District of Nebraska, entered on the 23d day of May, 1887.

The suit involves the title to a little more than nineteen hundred acres of land, the greater portion of which is situated in Lancaster county, Nebraska, near the city of Lincoln, and lying partly, as we understand it, within the corporate limits. The lands are of considerable value.

The litigation originally consisted of two suits, which were heard together in the lower court. The other suit, in which the two surviving sons of the appellant here, were complainants reached this court on appeal, but was dismissed

at the last term because of the inability of the appellants to furnish the clerk with sufficient funds to pay for the printing of the record. In that suit the appellants claimed a beneficial interest in an undivided two-thirds of the lands involved in the litigation. In this suit, the appellant, George H. Hilton, the father, claims the title to an undivided one-third of the same lands.

The facts upon which his claim is based are as follows:

It appears from the amended bill (Rec. 69) and is admitted by the several answers filed on behalf of the defendants, that in 1861, the appellant, George H. Hilton, was seized in fee simple of the lands involved, having derived his title directly from the government. He was at that time the father of three young boys, George L., James F., and Joseph B. Hilton, and was desirous of making some provision for their future welfare. His brother, John Hilton, an uncle of the three boys, was at that time a resident of Iowa. Being related to the family by these close ties, and being a man of about forty-two years of age (Rec. 126) in whose discretion and judgment and integrity the appellant had entire confidence, and being a resident of an adjoining state where he could exercise some oversight over the land, it was natural that appellant should desire to make use of his good offices in carrying out his plans in reference to his sons. And on the 26th day of October, 1861, appellant accordingly conveyed all the lands to his brother, John Hilton, in trust for the benefit of his three sons, imposing upon him the duty of selling the lands, as might in his discretion seem best. This instrument, as is admitted in the several answers, was duly acknowledged, and recording in the county of Lancaster, where the lands were situated. It is as follows: (Rec. 15.)

Know all men by these presents, that George H. Hilton, of Hamilton county, Ohio, in consideration of one dollar, and natural love, etc., to him paid by John Hilton, of Madison county, Iowa, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey to the said John Hilton, his heirs and assigns forever, in trust for benefit of my sons, George L., James F. and Joseph B Hilton, in equal portion said trustee having authority to sell and convey all or any portion at any time or in any way at his discretion, for their benefit —following described real estate, situate in the territory of Nebraska, viz: (here follows the description of the lands conveyed) being situated in Clay and Lancaster counties of said Nebraska territory.

And all the estate, title and interest of the said Geo. H. Hilton, either in law or in equity, of, in, and to the said premises, together with all the privileges and appurtenances to the same belonging; to have and to hold the same to the only proper use of the said John Hilton, in trust as aforesaid, his heirs and assigns forever; and the said Geo. H. Hilton, for himself and heirs, executors, administrators do, hereby covenant unto the said John Hilton, his heirs and assigns, that the title so conveyed is clear, free and unincumbered by any act of the said Geo. H. Hilton.

In witness whereof, the said Geo. H. Hilton has hereunto set his hand and seal this 26th day of October, in the year of our Lord one thousand eight hundred and sixty-one.

GEO. H. HILTON. [SEAL.].

Upon the back of the instrument John Hilton made the following endorsement, which also appears of record, as part of the conveyance. (Rec., 16.)

I accept the trust as above stated.

Witness my hand and seal this the 20th day of November, A. D. 1861.

JOHN HILTON. [SEAL.]

That this instrument and the acceptance upon it created in John Hilton a trust estate with attendant duties and obligations cannot be seriously questioned, and does not seem at any time to have been denied by the parties defendant. But in total disregard of the trust and his duties to the beneficiaries under it, John Hilton, on the 16th day of September, 1863, without any order of court, or

any proceeding in relation thereto, and without any power of substitution under the terms of the trust deed, attempted to renounce his trust by conveying of record all the lands to Alice B. Hilton, a sister of the *cestuis que trustent*. (Rec., 17.) The deed to her recites a grossly inadequate consideration of $1,000, which was in fact never paid to him, or intended to be paid. (Rec., 137.) There can be no doubt that this conveyance to Alice, who was then an unmarried girl of only twenty years of age (Rec., 138), was intended simply as a transfer of the trust estate from John to her, and was considered by both at that time (Rec., 138), to be a mere substitution of Alice as the trustee, instead of John. This, as will presently be shown, was also understood by the defendants to be the effect of the deed, and is so admitted in their answers.

Two years later, Alice B. Hilton was betrothed to Mr. Ducharme of Detroit, and on the 22d day of November, 1865, she attempted to convey, by an instrument in writing, duly recorded (Rec., 18), all the lands to her sister Augusta Hilton, then a young girl who had not yet reached her nineteenth year. (Rec., 138.) The deed recites upon its face a consideration "of natural love and "affection, and of the sum of one dollar." It also recites that the premises are the same that were conveyed to her by

> John Hilton, trustee for George L., James F. and Joseph B. Hilton, by deed dated 16th September, 1863.

This deed to Augusta was undoubtedly made in view of the approaching marriage of Alice to Mr. Ducharme, and upon the theory that possible complications in the trust estate might arise in consequence of it. It was clearly an attempt to invest her sister with the trust

estate, and to clothe her with the duties connected with it, which she supposed had been imposed on her by the conveyance from John Hilton; and that her sister might take her place as trustee to carry out the trust that appellant had originally confided to his brother John.

On the 25th day of August, 1871, George L. Hilton attained his majority, and Augusta Hilton on that day attempted to convey to him in fee an undivided one-third of the lands, and also attempted, "in consideration of the "sum of one dollar and natural love and affection," to convey to him in trust for his two brothers the remaining undivided two-thirds. The latter deed was in trust, and contained this provision (Rec. 73):

> The said trustee having authority to sell and convey all or any portion thereof at any time, or in any way in his discretion, for their benefit.

This is the exact language of the original deed from appellant to John Hilton, and shows clearly that all these conveyances of the trust estate had been made on the supposition that the estate was being transferred from one trustee to another, first from John Hilton to Alice, and then to Augusta, and then to George L. Hilton, and that John Hilton supposed that he could renounce the trust and divest himself of the duties imposed upon and accepted by him under the trust deed, by imposing these duties upon others by a simple conveyance of the trust estate to them.

(The trust deed from Augusta to her brother, George L., does not appear in this record, but will be found at page 128 of the record on file in this court in the case of *James F. Hilton* v. *James E. Jones*, No. 161, of the October term, 1891, which was dismissed at that term, as has been pointed out, for the failure to print the record. It

may be referred to here with propriety under the stipulation to be found in this record, at page 140).

It may be well here to remark that George L. Hilton, subsequently, on the 11th of September, 1872, without any order of court or other proceeding, and for a pretended consideration of $3,500 which was not paid or intended to be paid, conveyed the undivided two-thirds to Smith R. Galey. He conveys "as trustees for my two "brothers. (Rec., 75, and see record No. 161, p. 131.)

And a few days afterwards—on the 16th day of September, 1872, he again attempted to convey the undivided two-thirds to Galey, for a pretended consideration of $8,000, which was not paid. (Rec., 75.) In this deed (Rec., No. 161, p. 132), he recites the deed by Augusta to him in trust, and pretends to convey "as "such trustee and in pursuance of the said trust."

It is perfectly plain, however, that Galey took the alleged title without paying any consideration and with full knowledge of all the facts and as a supposed trustee only, for, on the 18th of September, 1873, he attempted to convey the undivided two-thirds for a pretended consideration of $100 to Wm. C. Lincoln, *not in fee simple but* in trust for the two boys. Lincoln was their brother-in-law, and apparently, as the record shows, a man of loose honor and integrity, though not so considered at that time. The deed to Lincoln contained the provision taken *verbatim* from the original deed to John Hilton. (Rec., 76, and see record No. 161, p. 226..)

> The said trustee having authority to sell and convey all or any portion thereof at any time or in any way, at his discretion, for their benefit.

The two deeds from George L. Hilton to Galey, and from Galey to Lincoln are referred to here to show how

fully Galey and Lincoln knew of the trust in John Hilton, and that they were fully aware of the whole alleged chain of title down to themselves.

All of the deeds above referred to were duly recorded and constituted a full and complete notice to the world of the trust confided in John Hilton, and of his attempt to renounce and divest himself of his duties as trustee.

When Augusta, on the 25th of August, 1871, attempted to convey the undivided two-thirds to George L. Hilton, in trust for his two brothers, she also attempted to convey to him in fee simple an undivided one-third of the lands, evidently upon the mistaken theory that when George L. had attained his majority he was entitled under the terms of the trust to such a conveyance. (Rec., 19.) She did this without consulting or advising with anyone (Rec., 53) and without the knowledge of her sister, Alice. (Rec., 59.)

It is this one-third of the lands that appellant claims in this suit.

On the 11th and 16th days of September, 1872, George L. Hilton was persuaded by Lincoln and Galey to convey to the latter the undivided one-third (Rec., 21, 22) for a grossly inadequate expressed consideration, none of which, however, was ever paid or intended to be paid. (Rec., 74, 75.) He was then but twenty-one years of age. And on the 18th day of September, 1873, he was persuaded to join with Galey in another pretended conveyance of the undivided one-third to Lincoln (Rec., 24), who at the same time pretended also to hold the other undivided two-thirds in trust, and to be clothed with all the duties and powers that had originally been confided by appellant in 1861 to his brother, John Hilton.

Subsequently Lincoln conveyed away the undivided one-third to the defendants.

From this recital of the history of the case and of the various conveyances, the conclusion arises irresistably that the deed from John Hilton to Alice, and from Alice to Augusta, and from Augusta to George L., and from George L. to Smith B. Galey and from Galey to William C. Lincoln, were in derogation of the rights of the *cestuis que trustent*, and that they were made upon the theory that John had the perfect right to renounce the trust after its acceptance and to divest himself of all of his duties as trustee, and, without an order of court or any other proceedings, to constitute Alice as the trustee in his stead and to clothe her with the estate as well as with the duties and obligations that had been confided to him by the appellant; and that Alice had the same right to divest herself and to invest Augusta with the estate and the duties and powers of trustee, and so on until the title as it is alleged rested in William C. Lincoln.

It is confidently submitted that the title has never passed from John Hilton, of which all the world had notice from the record.

But before proceeding with the discussion of this question, it may be well to call the special attention of the court to the matter of notice with respect to the particular defendants in this suit. James E. Jones, an Englishman, locally known as "Lord Jones," purchased of Lincoln by alleged conveyances set forth in the record as Exhibits H and I (Rec., 25-27) an undivided one-third of 906 92/100 acres of the lands included in the deed to John Hilton.

In Jones' sworn answer, the conveyance to John Hilton in trust is admitted, and then the respondent alleges that John Hilton has fully performed the trusts and exercised the powers thereunder by conveying the lands to Alice B. Hilton; that he

for the purpose of assuring, conserving and protecting the interests of said cestui que trusts, and for a valuable consideration paid and promised to be paid to him for their benefit by the said Alice B. Hilton, did convey all and every of said lands to the said Alice B. Hilton. (Rec., 104.)

The answer then distinctly and unequivocally alleges that Alice took a trust estate only. And it avers (page 105) that she has

fully performed the trusts and exercised the *powers* by said last mentioned deed of conveyance (i. e., the one from John to Alice) created and granted in this to wit: that on the 2d (22d) day of November, 1865, the said Alice B. Ducharme, born Alice B. Hilton, *acting under and by virtue of the said several deeds of conveyance, and pursuant to the powers therein contained * * * and for the purpose of further assuring, protecting and conserving their interests in said trusts and in said lands*, and for a valuable consideration paid and promised to be paid by the said Augusta Hilton for the benefit of said George L. Hilton, James F. Hilton and Joseph B. Hilton, did convey all and every of said lands to the said Augusta Hilton in manner and form and by deed bearing said last-named date, as in said bill of complaint averred, which deed was filed for record and recorded as in said bill averred.

At the point in this above quotation where an omission is indicated, the answer alleged that the conveyance to Augusta was made with the advice and consent of the appellant, of which there is no proof in the record; and with the advice and consent of the *cestuis que trustent*, the oldest of whom was then but eleven years of age!

And the valuable consideration which is here alleged to have been paid by Augusta to Alice "for the benefit" of these three boys, is stated on the very face of the deed to have been "*natural love and affection*" and "*the sum of one dollar*"! (Rec., 18.)

This is the nature of the notice that Lord Jones received from the record of the several conveyances — that the conveyance by John to Alice, and by Alice to Augusta were simply endeavors without authority in the deed or elsewhere to shift the trust estate with its duties and obligations from one to another. And yet with this knowledge staring him in the face he made the alleged purchase.

And the Otoe County National Bank, the only other defendant that makes special answer to that part of the amended bill, makes exactly the same admissions. (Rec., 94.)

On the 16th day of September, 1877, George L. Hilton died intestate, without ever having married, and leaving no issue. (Rec., 54, 80.)

The appellant, his father, claims the title in fee simple of an undivided one-third of the premises: first, on the ground that the beneficial estate in George L. was for life only, and consequently that he, as the original owner in fee and settlor, has become vested of the reversion by the falling in of the equitable life estate; and secondly, that as the heir, under the laws of Nebraska, of his son, he is entitled to the undivided one-third if the court shall be of the opinion that the son, under the trust deed, took more than a life estate. (Complied Statutes, Ch. 23 Sec. 30–7.)

In his bill he prays that each of the conveyances from John Hilton down to Lincoln, and all claims of title under and through Lincoln, may be declared to be null and void, and that the defendants may be perpetually enjoined from asserting any title adverse to him in and to the undivided one-third, and that John Hilton, the trustee, may be removed and a new trustee appointed.

The lower court dismissed the bill, without any findings, except that the equities were with the defendants. (Rec., 143.)

It is contended for the appellant:

1. That the title has never passed from John Hilton.

2. That each and all of the conveyances from John Hilton down to Lincoln, and by Lincoln to the defendants, are null and void and passed no title.

3. That the decree of the District court of Nebraska is void for want of jurisdiction over the parties and over the subject-matter.

4. That the *cestuis que trustent* under the deed to John Hilton, took a life estate only, and upon the death of George L. Hilton, an undivided one-third reverted to the appellant as the original settlor.

And for the failure of the lower court to so find and enter a decree for appellant in accordance with these contentions, error is specified.

ARGUMENT.

I.

The answers of the principal defendants, to which a reference was made in the statement of the case, relieve us of the necessity of discussing at length the question of notice. The conveyance from appellant to John Hilton upon its face purports to be, and clearly is, an instrument of trust. It contains all the elements of a full, complete and active trust, and the recording of the instrument gave to all subsequent purchasers full notice of the terms and conditions upon which he held the title.

The conveyance by John Hilton to Alice recites (Rec., 17) that the premises conveyed are the same

> conveyed by Geo. H. Hilton to John Hilton in trust, etc., by deed dated 26th October, 1861.

And also that

> The said John Hilton herein named conveys as trustee of Geo. L. and Joseph B. and James F. Hilton.

These recitals are alone of sufficient importance to put the ordinarily cautious man upon inquiry, and contain ample information, in view of the grossly inadequate price mentioned in the deed, that the conveyance to her was not in pursuance of the power to sell but an endeavor to constitute a new trustee, and the defendants so understood it, as they expressly admit in their answers. It is true that they allege that Alice paid him $1,000 for the benefit of the three boys, which was proved not to have been paid or intended to be paid. But at the same time they allege that the conveyance made to her by John was made "*for*

"*the purpose of assuring, conserving and protecting the "said interests of said cestui que trusts.*" (Rec., 104, 94.) And they admit that Alice took the estate only in trust. In other words they allege that John Hilton tried to shift these duties upon Alice and make her the trustee, and that Alice fully performed the trust by conveying all the lands to Augusta in consideration of love and affection. (Rec., 95, 105.)

The question of notice is, therefore, eliminated from the case. The defendants clearly admit notice of the fact that John Hilton did not part with the title under the power of sale, but simply endeavored to constitute a new trustee.

II.

JOHN HILTON, HAVING ACCEPTED THE TRUST, HAD NO POWER TO RENOUNCE IT AND DISCHARGE HIMSELF FROM THE PERFORMANCE OF THE DUTIES ASSUMED.

The deed from appellant to John Hilton, while perhaps subject to the criticism of unskilful drafting, nevertheless expresses clearly the purpose and intent of the grantor.

Knowing the probable future of the western country, he desired to make a provision for his sons that would afford them support and maintenance during life, and as he lived in the east and could not keep himself well informed about the lands, he intrusted the estate to his brother, who lived in Iowa, and in whose foresight, discretion, business capacity and sound judgment he had entire confidence.

It is clear, from the terms of the instrument and the

tender years of the three boys, that the intention was that John Hilton should have the entire management of the estate, free from any control by the beneficiaries or others, and that the sale of it was confided to his sole discretion.

Here, then, is a personal trust and confidence, reposed in John Hilton, which he accepted and agreed to perform and carry out. The question, therefore, at once arises, whether, having accepted the trust, he could afterwards renounce it and divest himself, by his own act, of its duties and obligations, and impose them upon another.

The rules of law in relation to trust estates, and the duties and rights of trustees and benificiaries are very old and well established, and among them none has been more repeatedly invoked and upheld than that the trustee cannot under such circumstances renounce the trust.

Perry, in his work on Trusts at Sec. 274, lays down the rule thus:

> If a trustee once accepts the office, he cannot by his sole action be discharged from its duties. Having once entered upon the management of the trust, he must continue to perform its duties until he is discharged in one of three ways: first, he may be removed and discharged, and a new trustee substituted in his place, by proceedings before a court having jurisdiction over the trust; second, he may be discharged, and a new trustee appointed, by the agreement and concurrence of all the parties interested in the trust; and third, he may be discharged and a new trustee appointed, in the manner pointed out in the instrument creating the trust, if it makes any provisions upon that subject. Mere abandonment of the trust will not vest the property in the hands of his co-trustee, nor relieve a trustee from liability.

It is not alleged by the defendants that John Hilton was discharged in any of these three ways, but it is alleged that appellant and the *cestuis que trustent* consented

to the transfer of the trust estate by him to Alice B. Hilton. It is, to say the least, doubtful whether the appellant did consent or know of it until afterwards; and it makes no difference if he did. For the same author elsewhere points out that this consent must be by all the parties, and that they must be *sui juris*. He says (Sec. 401):

> If all the parties are not *sui juris*, recourse must be had to a court of equity.

And again, at Sec. 268, he observes:

> The trustee may decline the office and convey the estate to a new trustee, by agreement of all the parties in interest, if they are competent to act, and consent to the arrangement. But if the parties do not consent, or if there are minor children, married women, insane persons, or others incompetent to act, a trustee, after he has once accepted the office, can only be discharged by a court having jurisdiction, and upon proper proceedings had.

See also *Cruger* v. *Holliday*, 11 Paige, 319.
Ross v. *Barclay*, 18 Pa. St., 179.
Shepherd v. *McEvers*, 4 Johns. Ch., 136.

And this must be true upon principle. The right of the beneficiaries under a trust deed is a vested right, which is and can be limited in its extent only by the terms and conditions of the instrument of trust. This beneficial right, when once vested, cannot, in the absence of provisions in the instrument permitting of it, be changed or altered in any respect, except with their consent, and not then unless they are competent to give their consent. The desire of the grantor or of the trustee cannot avail to change or alter their vested rights or the terms and conditions of the trust estate. Nothing can be plainer, and nothing in the law of trusts has been more firmly established than this proposition.

One of the rights that accrued to the *cestuis que trustent*

under the instrument in question was the right to have the benefit of the business capacity and sound judgment and discretion of their uncle, John Hilton. The instrument itself gave them this right and John Hilton, by his acceptance of the trust, solemnly vouchsafed it to them. How, then, can they, without their consent, be divested of this right, except by a decree of court having jurisdiction over the trust estate. It was his refusal longer to act and his attempt to impose these duties and obligations upon Alice, a young woman of only twenty and the subsequent attempt of Alice to shift the duties upon Augusta, a girl of only nineteen, without experience in business and presumably without sound discretion, that gave the defendants their opportunity and that has wrecked the estate and deprived these young boys of the wise provision that had been made for them during their lives.

It has already been observed that the deed from appellant shows plainly upon its face that the trust and confidence reposed in John Hilton was a personal trust and confidence which attached to him personally and not *virtute officii*. It is not, of course, intended by this observation to claim that his death or refusal to act as trustee would necessarily destroy the trust. But it is insisted that even if he could by any possibility transfer the trust estate to another he could not clothe the new trustee with the rights and duties that were given to him because of the personal trust and confidence reposed in him. The right therefore to sell would not attach to the new trustee. It might possibly still exist in the interests of the beneficiaries, but, it could only be exercised, if at all, under the supervision of a court having jurisdiction over the trust estate.

Numerous decisions on this question will be found in

the reports especially where a testator has directed property to be sold at the discretion of two or more persons named in the will. It has invariably been held that they all must act, when the will indicates a personal confidence in them jointly.

Perry on Trusts, Sec. 496–7.
Peter v. *Beverly*, 10 Pet., 532.

In Lewin on Trusts (Flint Ed.), page 245, it is said that the only modes by which a trustee can divest himself of the trust are:

> *First*, he may have the universal consent of all the parties interested. *Secondly*, he may retire by virtue of a special power contained in the instrument creating the trust (or a statutory power applicable to the trust), or, *Thirdly*, he may obtain his release by application to the court. * * * But the *cestuis que trust* who join must be *sui juris*, not *femes covert* or infants, who have no legal capacity to consent.

See also *Chalmer* v. *Bradley*, 1 Jac. & W., 51, at page 68.

In *Brennan* v. *Willson*, 71 N. Y., at page 507, the rule that a trustee, after accepting, cannot renounce his trust, is laid down in this language:

> But having accepted he could only be relieved of the trust and divested of the estate by the order of a court of competent jurisdiction. [* * * A trustee having once accepted the trust in any manner, *a purchaser cannot safely dispense with his concurrence* in a sale of the trust estate, notwithstanding he may have attempted to disclaim, and although he may have released his estate of co-trustees.

In *Crewe* v. *Dicken*, 4 Vesey, 97, one of two trustees, after having accepted the trust, conveyed to his co-trustee. One who had contracted to purchase of the trust estate refused to take the receipt of only one trustee, and an application to compel him to do so failed, the Lord Chancellor holding that he could not be put to the hazard

of taking from one trustee, and that the other trustee could not convey away his trust.

This case is cited with approval in *Brennan* v. *Willson*, *supra*.

In *Cole* v. *Wade*, 16 Vesey, 27, a testator devised property to two trustees, giving to them or the survivor of them, and to the heirs, executors and administrators of the survivor, the power in their discretion to divide the estate amongst his nearest kin. Both of the trustees died, the survivor of them, however, having by will devised the trust estate to a new trustee. But the court held that by the death of the original trustees the discretionary power confided in them had become extinct, and could not therefore be executed, and that the court in executing the trust must be confined to the next of kin within the statute of distributions.

In 1 Perry on Trusts, Sec. 273, it is said:

> Powers that imply a personal confidence in the donee must be exercised by the persons in whom the confidence is placed, and to whom the power is given. Such powers, therefore, will not vest, by the disclaimer of one, in his co-trustee, but will be absolutely gone.

It will not be necessary to multiply authorities on this point. The conclusions to be derived from them are:

1. That John Hilton had no power to denude himself of the trust estate and to convey it to Alice as a new trustee, as alleged in the answers of defendant, and that each subsequent attempt to constitute a new trustee from Alice down to Lincoln was void, each of them having taken with full notice of the original trust in John. And that the defendants had full notice of the attempt to tranfer the trust is clearly admitted in their answers.

2. That the estate held in trust by John Hilton for the

three sons has never passed from him and that the title still remains in him: and that the title of the defendants, if any they have, is subject to the terms of the original trust.

III.

THE DEED FROM APPELLANT TO AUGUSTA PASSED NO TITLE AND FORMS NO PART OF THE CHAIN OF TITLE.

Reference is made in the answer of Jones to a deed by appellant to Augusta Hilton dated May 18, 1866, and recorded August 30, 1867. The deed purports to convey all the lands in question in fee simple to Augusta Hilton. In reference to this deed the defendants in their answers have allowed themselves to resort to a very wild conjecture which they totally fail to prove.

The deed contains a recital as follows (Rec., 111):

> This deed is made to perfect the title in Augusta Hilton as it appears that the deed, made by the grantors, dated 26th October, 1861, *through* which title to said lands vested in her, has not been recorded and has been mislaid or lost.

From this recital the defendants Jones the Otoe County National Bank, have in their answers, but not by any proof whatever, worked out the curiously absurd theory that on the 26th day of October, 1861, when appellant conveyed the lands to John Hilton, he also conveyed to Augusta by another instrument, so that John and Augusta as the answers allege held jointly (Rec., 95, 96, 105, 106). In this way an attempt is made in the answers, and will probably be repeated on the brief to show that the trust estate rested legally in Augusta, not through the conveyance to her by Alice, but through a supposed conveyance to her by appellant in 1861, that

was simultaneous with the conveyance to John Hilton. This conjecture is most absurd. The deed to John Hilton remained in his possession until 1863, when in some way, and how, he does not remember, it went into the possession of his brother Edward, among whose papers it was afterwards found, and then put of record in 1867, just after Nebraska had been admitted to the Union, and the county governments organized. This is all clearly explained at page 131 of the record. The recital in the deed clearly refers to the deed to John, and not to an imaginary deed to Augusta. The language of the recital is "*through*" which not "by" which "title vested "in Augusta."

The deed from appellant to Augusta, was recorded August 30, 1867. (Rec., 111.) The deed to John Hilton was recorded December 24, 1867. The latter deed dated five years before, was, when recorded, notice to all the world that the subsequent deed to Augusta was not effective, but absolutely void, because the title had passed out of appellant by a prior deed. And the defendants will not be heard to say in this court that, with three prior deeds on record—from appellant to John, from John to Alice and from Alice to Augusta—they had no notice of this. Every link in this chain of title makes it perfectly clear that after the finding of the deed to John, no one considered the subsequent deed to Augusta as a part of the title. Of this there was abundant notice on the record, which was unmistakable and could deceive no one. The deed from John to Alice recites the deed from appellant to him of October 25, 1861 (Rec., 17), and the deed from Alice to Augusta recites the deed to her from John. (Rec., 18.) How clearly the defendants understood this to be the

true chain of title, is made apparent in their answers (Rec., 94, 95, 104, 105), and that no one ever conceived the deed from appellant to Augusta to form a link in the chain will become more apparent by a reference now to be made to a subsequent proceeding.

IV.

THE DECREE OF THE DISTRICT COURT OF NEBRASKA IS NO BAR.

After Smith B. Galey had attempted and assumed, on September 18, 1873, to convey the undivided two-thirds of the lands to William C. Lincoln in trust for the two boys then remaining under age, and when Lincoln claimed also the ownership in fee of an undivided one-third, he, Lincoln, commenced proceedings in the district court for the second judicial district of Nebraska, which resulted in a decree now set up in the answers of Jones and the Otoe County National Bank, and of Lowrey, as an absolute bar to this bill. The petition filed by him is referred to in the answers. (Rec., 98, 108.) The alleged decree appears in this record, but not the petition and other proceedings, which were lost when the record was made up, and to supply which the appellant has entered his motion in this court with a statement of the facts (q. v.).

It appears from these proceedings that on the 13th of December, 1873, (Motion, 14) in the court above named, Lincoln filed a petition in which he sets up that he holds in trust for James F. and Joseph B. Hilton the two infant sons of appellant, a two-thirds interest in about 2,000 acres of wild and uncultivated land, and that he has been at certain expense for clothing, taxes etc.

The attention of the court is specially directed to the further allegations of this petition.

After setting up that the lands were originally deeded by appellant in trust to his brother, John, Lincoln alleges (Motion, 7), that

> Owing to the fact that *several unlawful conveyances* of said lands have been made, said lands have become the subject of long and expensive litigation.

He then alleges (Motion, 8):

> That said property, since the conveyance by Geo. H. to John Hilton in trust, as above stated, has been conveyed by the said John Hilton to Alice B. Hilton (now Ducharme), and by said Alice B. Hilton to Augusta Hilton, and by the said Augusta Hilton to Geo. L. Hilton, and by the said Geo. L. Hilton to Smith B. Galey, and by the said Galey to this plaintiff, *in trust for said infants;* that although the various conveyances above mentioned conveyed the legal title IT HAS WELL BEEN QUESTIONED WHETHER IT IS NOT NECESSARY TO HAVE A DECREE OF THIS COURT TO CONFIRM THE EQUITABLE TITLE IN THE PLAINTIFF; and, that he may be able to procure the full value of the lands in case the court on this showing shall deem it best to dispose of the same or some part thereof, *he would ask for a decree of this nature.*

He then injects into the petition an allegation that he is the owner in fee of one-third of the lands. (Motion, 8.)

He then prays for a decree or order directing him to sell *one-half* of the lands, or to mortgage it for $10,000 if a sale cannot be made to advantage, and out of the money thus procured to pay off the taxes and liens and to reimburse himself for the money expended by him, the the balance to be invested as the court may direct. (Motion, 9.)

And then follows this part of the prayer with which the petition concludes. (Norten, 9.)

> 2. That the court by order or decree *declare and settle the equitable as well as the legal title to the lands aforesaid to be in the plaintiff as trustee for said infants* and for such other and further relief as justice and equity may require.

The decree entered upon this petition appears in this record (page 122) as part of the answer of Thomas W. Lowrey, one of the defendants. After finding that Wm. C. Lincoln holds the legal title to an undivided two-thirds of the lands in trust for James F. and Joseph B. Hilton, it also finds (Rec., 123) "*that he is the owner in fee of the undivided one-third of the same.*"

This one sentence is insisted upon by the defendants as a complete bar to appellant's just rights to the one-third —an adjudiction by which he is bound. But if we understand aright the principles upon which the great rule of *res adjudicata* is founded, it cannot be prostituted to such results as is here sought. Upon this point the defendants substantially rest their case, and we are therefore justified in directing the attention of the court in some detail to the proceedings which resulted in that decree.

It appears from the record, in that proceeding that the appellant and the surviving members of his family united in a petition to the District court, praying that Lincoln be appointed trustee for James F. and Joseph B. Hilton, with the powers and rights expressed in the original deed of trust to John Hilton (Motion, page 13). The petition seems to have been prepared as an original petition upon which to found a decree. But instead of using it for that purpose, Lincoln prepared a petition of his own, to which he attached the other petition as an exhibit. The Hiltons were made defendants and were brought into court, as it is alleged, by summons.

In his petition, as has already been pointed out, he refers to the conveyances from John Hilton to Alice and so on down to himself, as "unlawful conveyances," and alleges that it has been well questioned whether they op-

erated to vest the equitable title in him. (Motion, page 7, 8.) And he prays for a decree or order directing him to sell one-half the lands in order to pay certain debts enumerated in the petition, and for a further decree or order establishing and confirming the equitable as well as the legal title in him "*as trustee for said infants.*" (Motion, 9.)

He does not anywhere in the petition, ask any relief as to the undivided one-third, to which he and those under him claim title. He does, it is true, inject into the petition, by way of recital only, that he is the owner in fee simple of the one-third. But the prayer of the petition is absolutely silent as to any relief in respect to it. And notwithstanding this failure to pray any relief he has interpolated in the decree a finding "that he is the owner "in fee of the other undivided one-third." (Rec., 123.)

A mere casual reading of the petition will show that it had but one legitimate object upon its face, and that was to have Lincoln appointed trustee, and for an order to sell a portion of the lands to pay certain debts that had accumulated against the trust estate. The whole tenor and scope of the petition relates simply to the undivided two-thirds; and it appealed to, and invoked, not that jurisdiction which enables courts of equity to perfect titles to real property, but to that jurisdiction which such courts have over trustees and trust estates. This was the whole meaning of the petition; and yet by putting in it an assertion of his alleged title in fee simple to the undivided one-third, he has endeavored to use the petition, which, as has been said, appealed to an entirely different jurisdiction of the court, as a bill to remove clouds and perfect in him a title which, on the very face of the petition, he admits to have been unlawful. So that without praying

the court to pass upon the legality of his alleged title, or exhibiting to it title deeds or any other evidences, and indeed without setting up in the petition a single indication, except by the merest inference, of the source whence his alleged title was derived, he, and those claiming under him, with full notice of the decree and the proceedings upon which it was based, would have this court hold that the decree perfected the title in him to the one-third, and that it is a bar to this bill of complaint.

This decree or order may have some semblance of the *form* of law, but it certainly has none of its essence. And it is earnestly submitted that that part of the decree which purports to declare the title to the undivided one-third of the lands to be in William C. Lincoln in fee simple was a fraud upon the court and the parties, and is in no sense an adjudication, and is in no sense binding upon the appellant.

It was clearly supposed by the court to be a proceeding by consent, but as a matter of fact none of the parties knew anything about it. And in this connection it will be proper to direct attention to other portions of the record in the case.

James F., Joseph B., Alice B., Augusta and George L. Hilton and Norah M. Lincoln, the wife of the petitioner, and a daughter of the appellant, appear upon the *praecipe* as parties defendant, and the summons was directed to be issued to them alone. (Motion, page 14.)

John Hilton, the original trustee, and George H. Hilton, the appellant, are not named. In the summons, however, the name of George H. Hilton was inserted. (Motion, page 15.)

The return on the summons shows that appellant,

Alice and Augusta, were not found in the bailiwick. As a matter of fact they lived in the East. (Rec., 79.) It shows that the other defendants, however, were served. (Motion, page 15.) But it is alleged in the bill (Rec., 80), that during the pendency of the matter in court Lincoln had the three boys removed to Chicago, and placed at service in stores in that city so that no one was present while the fraud was being consummated, and no one knew anything about it.

It is also to be noticed that one Seth Robinson filed an alleged disclaimer purporting to be on behalf of the the appellant, Alice and Augusta (motion, page 17), in which they are made to disclaim all right, title or interest in the lands described in the petition and in each and every part thereof.

We had intended here to call the attention of the court to the answers under oath of the appellant, John Hilton, Augusta and Alice, in the case of *Hilton* v. *Jones*, No. 161 of the October term, 1891, in which they vigorously deny that Robinson had any authority whatever to appear for them, and that his disclaimer on their behalf was utterly fraudulent and without authority, and that they had no knowledge of the proceedings at all, and that if they had had any knowledge of it they would have opposed it. But we are just advised by correspondence from Washington that these answers, which were read in evidence in the lower court, do not appear in the record. Whether they had been abstracted from the files does not appear.

But Robinson was Lincoln's own attorney, and when Lincoln, disregarding the decree of the District court which purported to give him authority to sell one-half of the lands, *sold all of them*, it was Robinson who appeared as his attorney and persuaded the court to confirm his act

in so doing. And in this second iniquity by Lincoln and Robinson the only members of the Hilton family that were made parties defendant were the two young boys, James F. Hilton and Joseph B. Hilton, still being minors, and the return on the summons shows that the sheriff served them only "*by leaving at the usual place of resi-*"*dence of each a true and certified copy of the same, with* "*all the endorsements thereon.*" (See record in No. 191, page .) The "usual place" of their residence, presumably, was Lincoln's own house. And that the decree entered on such service was void. See

N. Y. Life Ins. Co. v. *Bangs*, 113 U. S., 455.

It is difficult to contemplate with equinimity such a palpable outrage. It is difficult to see how courts can be used for such purposes. Had the two boys been personally served it is quite certain that they would have communicated with their father, and that some steps would have been taken to circumvent the fraud. But every one was kept in ignorance of what was going on.

The rule of law seems to be perfectly well settled that an attorney has no implied authority even when retained to waive any substantial right of his client, such as to acknowledge service or to confess judgment, and much more is this true when he is not retained, and enters his appearance wholly without authority. It will not be necessary to support such a proposition by numerous authorities.

The question has been much discussed but the rule is now settled that a judgment or decree based upon the unauthorized appearance of an attorney is an absolute nullity, even when *bona fide* purchases have been made

under it, and is not binding, but may be attacked collaterally.

Shelton v. *Tiffin*, 6 How., 186.
Walden's Lessees v. *Craig's Heirs*, 14 Pet., 154.
Lavin v. *Bank*, 1 Fed., 664.
Daily v. *Doe*, 3 Fed., 918.

And see *Harshey* v. *Blackman*, 20 Iowa, 181, where a large number of authorities are discussed. And the note in 78 Am. Dic., 146.

The result of the whole fraud was that Lincoln, upon the strength of the pretended disclaimer, disposed of all the lands, and of the moneys received has never made any accounting whatever. And he was also enabled to get in the form of a decree an account against the *cestuis que trustent* which was almost wholly fraudulent. (Rec., 59, 60.)

But in another, and a vitally important particular, the whole proceeding was null and void, and from this there is no escape.

In the petition Lincoln expressly admits and alleges that the various conveyances from John Hilton, to Alice, and from Alice to Augusta, from Augusta to George L., from George L. to Galey and from Galey to him, were all unlawful, and did not operate to vest the title to the two-thirds in him, and that the title remained in John Hilton. By the very same chain of title he acquired his alleged title in fee to the undivided one-third.

The several conveyances through which that alleged title came to him were therefore also unlawful and the title to the undivided one-third, also remained in John Hilton. And John Hilton was not made a party to the proceeding in the District court in any way whatever.

It is true that in the fraudulent disclaimer filed by Robinson on behalf of appellant, Alice, Augusta and Nora Lincoln, the title of the suit is given as "William "C. Lincoln *agt.* John Hilton, etc." (Motion, 17); and in the answer filed by the same Robinson, as guardian *ad litem* of James F. and Joseph B. Hilton, the title is also given as "William C. Lincoln *agt.* John Hilton, etc." (Motion, 18). But it will be noted that neither the return on the summons, nor any other part of the record shows that John Hilton was served with process, or appeared, or was in any way actually and in fact made a party defendant. He made no answer nor was any answer made for him. The alleged disclaimer by Robinson was expressly limited to appellant, Alice, Augusta and Nora M. Lincoln (Motion, 17). So that the very person of all others who ought to have been made a defendant, and in whom the petitioner substantially confessed that the title still remained was not a party at all, and of the failure to make him a party, the defendants in the suit had of course full notice.

It is earnestly submitted that John Hilton, the original trustee, was a necessary and essential party defendant, and that without him there has been no adjudication which is binding on appellant.

When the *cestuis que trustent* are very numerous the courts sometimes for convenience treat the trustee as the representative of them and will deem them to be in court and under the jurisdiction of the court, when the trustee has been served and has entered his appearance. But the general rule is that both the trustee and the *cestui que trust* are necessary parties. Even in the foreclosure of an ordinary trust deed to secure a loan the trustee who holds the dry legal title only is a necessary party, and a

foreclosure in which he was not a party defendant would be an anomaly. In this case however Lincoln has reversed the general rule. The *cestuis que trustent* were made parties, and it is claimed that the appellant, the original settlor, was also made a party. But John Hilton, in whom the legal title vested as trustee, and in whom also vested certain rights, duties and obligations in respect to the trust estate, was not made a party, although on the very face of the petition it is admitted that the title is still in him and that the several conveyances down to Lincoln were unlawful. John Hilton was not dead, and had not absconded. He was accessible to service, and could easily have been brought within the jurisdiction of the court. The infirmity in the title which is set up in the petition might thus have been cured. But has it been cured? We think not. The very utmost that can be said for the decree as an adjudication is by way of a weak analogy to the death of a trustee or his refusal to qualify as such. In cases of this nature courts of equity, by virtue of their well established jurisdiction over trusts, may appoint a new trustee. But this theory, if applicable at all, applies only to the undivided two-thirds which Lincoln only pretended to hold in trust.

As to the undivided one-third, it has no possible application. His alleged title to this portion was stricken with the same infirmity. It was also "unlawful." In fact he had no title, and admits that the title still remained in John Hilton. And it will be observed that he claimed the undivided one-third, not in trust but in fee. He therefore appealed to the court, so far as the one-third is concerned, not as the conservator of trusts and of trust estates, but to that jurisdiction which enables courts of chancery in proper cases and upon a proper showing to

perfect titles to real property. His petition therefore, as has been before remarked, was, so far as the one-third was concerned, nothing more nor less than a bill to remove clouds. The infirmity in his alleged title that constituted the cloud was an outstanding and paramount title in John Hilton in trust for the three boys, with important duties and obligations attending it, which remained unfulfilled and unperformed. He was a party in interest, and that he was a necessary party without whom the alleged title of Lincoln could not possibly be perfected, seems such an elementary proposition as to admit of no further discussion.

It is earnestly submitted that even if the statement in the decree, that Lincoln holds the undivided one-third in fee, is anything more than a mere recital, and is to be accorded the dignity of a finding, it, nevertheless, can afford no protection to the defendants, and is not a bar to this proceeding, for the reason that John Hilton was not made a party. And it is insisted that the trust in John Hilton remains unimpaired by the decree and is still in full force and effect.

In *O'Hara* v. *Connell*, 93 U. S., 150, a bill was filed to declare a conveyance by O'Hara and his wife in trust for her, void as a fraud upon his creditors. They were both made parties as was also one Barr, the guardian of the wife, but the trustee, in whom there was an active trust was not. Mr. Justice MILLER, who delivered the opinion, says, p. 154:

> How the decree can clear the property of this trust without having the trustee before the court it is difficult to see. This was the object of the suit; but how can it be made effectual for that purpose in the absence of the person in whom the bill is vested?

The day after Mrs. O'Hara became of age, she and her husband made a conveyance of the property, to the appellees, and this was set up. But the court held that this did not aid the decree, and that the conveyance must stand or fall on its own merits.

In *Greenleaf's Queen*, 1 Pet., 138, where a trustee had died, and his administrator had been appointed trustee in his stead, and was directed as such trustee to make a conveyance, the decree was held to be void, as the legal title vested in the heirs of the first trustee, and they had not been made parties.

Under this decree the defendants pretend to claim title, and to the relief prayed for in the bill they set it up as a bar. It will be noticed, however, that their deeds from Lincoln do not purport to be made under the authority of the decree, and do not mention it at all. (Rec., 25–33.) They are drawn in the ordinary form only.

As has been said, there may be some of the forms of law in the proceeding, but the record is full of defects which should have put purchasers upon notice and inquiry.

In *Graffam* v. *Burgess*, 117 U. S., at page 186, where it was contended that the proceedings were all conducted according to the forms of law, the late Mr. Justice BRADLEY tersely replied:

> Very likely; some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law.

V.

THE DEED TO JOHN HILTON CONVEYED A LIFE ESTATE ONLY TO THE THREE SONS OF APPELLANT.

In the construction of a deed of trust and the extent of the estate demised thereunder, it is well settled that the same canons and rules of law apply as are applicable to ordinary deeds and to ordinary legal estates. The language of the deed from appellant to John Hilton is as follows:

> * * * hereby grant, bargain, sell and convey to the said John Hilton, his heirs and assigns forever, in trust for benefit of my sons, George L., James F. and Joseph B. Hilton, in equal portion, said trustee having authority to sell and convey all or any portion, at any time or in any way, at his discretion for their benefit. (Rec., 15.)

And the *habendum* is:

> To have and to hold the same to the only proper use of the said John Hilton, in trust, as aforesaid, his heirs and assigns forever.

The court will at once observe two elements in this this deed.

1. That the legal estate is conveyed to John Hilton *and his heirs*.

2. That the beneficial estate *contains no words of inheritance whatever*, nor any words which in any sense imply an estate in them of inheritance.

Now one of the oldest rules relating to real property is that words of inheritance are essential to pass an estate in fee simple. The quality of inheritance is absolutely essential to such an estate, and no words indicative of mere perpetuity, however strong they may be, can possibly constitute a fee. In the construction of devises by will this rule is somewhat relaxed, but in the construction of

deeds it remains in all its vigor one of the great and elementary canons of real property.

In Coke (Vol. 1, page 493) the rule is thus stated:

> For if a man would purchase lands and tenements in fee it behooveth him to have these words in his purchase: "To have and to hold to him and to his heirs." * * * For these words make the estate of inheritance. For if a man purchase lands by the words: "To have and to hold to him forever," or by the words: "To have and to hold to him and his assigns forever"; in these two cases he hath but an estate for life, for that there lack these words (his heirs) which words only make an estate of inheritance in all feoffments and grants.

And this ancient rule is still uniformly held to be the law, both in this country and in England, except where the statute makes other provisions. Indeed in *Adams* v. *Ross*, 16 Vroom, p. 512, where it was contended that the word "children" was equivalent to the word "heirs," the court thought it doubtful whether a single well-considered case could be found in England or in this country where, in the consideration of a deed, a court had so held.

A few of the numerous instances of this strict rule may be cited.

Thus, a grant

> to J. M. and his *generation*, to endure so long as the waters of the Delaware shall run

was held to pass no more than a life estate.

Foster v. *Joice*, 3 Wash. C. C., 498.

So a conveyance to one and "his lawful representatives" is but a life estate.

Willer v. *Rolason*, 2 C. E. Green, 13, 17.

And the intention of the grantor in the deed, however apparent, does not signify. In *Curtis* v. *Gardner*, 13 Met., 457, it was held, that whatever might be the in-

tention of the parties with respect to the extent of the estate conveyed, the rule of law that required the use of words of inheritance was inflexible, and no words of perpetuity could supply the omission of these words of limitation.

In *Adams* v. *Ross*, 1 Vrooman, 506, it is said:

> In the construction of a deed the question is not what estate did the grantor intend to pass, but what estate did he pass by proper and apt words. No expression of intent, no amount of recital showing the intention will supply the omission.

A notable instance of this inflexibility of this rule will be found in *King* v. *Barnes*, 13 Pick., 24, where a deed was made conveying to Hubbard and his heirs, in consideration of his agreement to support the grantor and his wife during their lives, one-half of all the grantor's lands. The instrument also contained this further grant:

> After my decease and after my wife's decease, the said Hubbard, for the consideration above mentioned, shall have the other half of all my estate, both real and personal, free and clear, freely and clearly from all other gifts.

It was held that he took an estate in fee in one-half the lands, and a life estate only in the other half.

An interesting discussion of the same general question will be found in the case of *Adams* v. *Ross*, 4 Dutch., 160. Here a Miss Traphagan conveyed certain real estate to Catherine Adams, in consideration of love and affection.

The terms used in the deed were:

> Grant, bargain, sell, alien, remise, and release and confirm, unto Catharine Ann V. B. Adams, wife of Alonzo Adams, all that etc., situate etc., for and during the natural life of the said Catherine, and at her death to her children which may be begotten of her present husband, Alonzo W. Adams

The deed contained covenants of warranty by the grantor and her heirs to the grantee and her heirs and assigns. And it was contended that the word "chil-

dren," when made in the light of the covenant meant "heirs" and that Mrs. Adams took an estate in fee tail special. And the Supreme court so held. But upon appeal to the Court of Errors this conclusion was reversed. It was there held (1 Vrooman, 505) that a covenant of warranty could never be held to enlarge the grant and that Mrs. Adams took a life estate only. It was also held that her children took only a life estate in equal shares there being no words of inheritance or procreation and that the reversion was in the original grantor who was entitled to the share of any deceased child.

In Newman's Appeal, 35 Pa. St., 339, John Brink being the owner in fee of a farm called the "Cole farm," executed an instrument as follows:

> In consideration of natural love and affection which I have and bear to my son William Brink and his children, and toward the better maintenance and education of the same, and for other causes, have given, granted, bargained and sold, confirmed and by these presents do remise and release forever, unto William Brink, for himself during his natural life, and in trust for and for the use of his children, share and share alike, all the farm on which he now resides, or which was conveyed to me by Cornelius Cole, situate on the river Delaware.

In the same case, in 31 Pa. St., 165, it was held that William only took a life estate, and in this case it was also held that the instrument gave to the children a life estate also, but no greater estate than that.

In *Mattocks* v. *Brown*, 103 Pa. St., 16, Asa Mattocks conveyed a life estate to his father, Charles Mattocks, and the latter's wife, by an instrument which also provided that if Asa should decease before his father,

> in that event and solely upon that condition, the hereby demised premises shall go to and be vested in the five children, and their representatives, of Charles Mattocks.

Asa having died before the father, it was contended

that the children took the estate in fee simple, but there being no words of inheritance in the grant, the court held that they took a life estate only. It was contended that the word "representatives" was the equivalent of the word "heirs." The court say (page 21):

> However this may be in the case of a will where greater laxity of construction is sometimes permitted in order to carry out the intent of a testator, it has been uniformly held that in a deed a fee does not pass without words of inheritance. In a will the legal force of the word "heirs" may sometimes be controlled by the context, but not so in a deed. It is in a deed a term of art. The rule of law is that in a present conveyance without the word "heirs" but an estate for life passes.

In *Holliday* v. *Overton*, 15 Beav., 480, decided by Sir John Romilly, the Master of the Rolls, a marriage settlement was executed by which Mary Heathcote conveyed her property to a trustee, his heirs, executors, administrators and assigns, in trust, for her separate use for life, and after her decease, in trust for such persons as she by her will, during the intended overture, should appoint; and, in default of appointment,

> *in trust for the children of Mary Heathcote, equally to be divided between them, share and share alike*, as tenants in common, and not as joint tenants.

The recitals in the instrument expressed her desire to make "the *reversion* and principal trust" a provision for the children of her former marriage.

It was contended that this recital showed an intention to settle the "reversion and principal" on the children, *i. e.*, that they should take a fee simple, and that the intention should control the operative part of the deed.

It was held, however, by Sir JOHN ROMILLY that the provision relating to the children contained no words of inheritance, and, in default of an appointment by the mother, that they took a life estate only. He also observed

that the liberality indulged in the construction of wills was not permissible in the case of a deed executed, which must be construed by the strict rules of law.

So, in *Wheeler* v. *Duke*, 1 C. & M., 210, property was conveyed to trustees in trust for certain purposes, and in further trust

"to the use of all and every the child or children of G. D. by his former wife (naming them) *and their issue* * * * equally, to be divided between and amongst them in equal shares and proportions, as tenants in common, and not as joint tenants, and his, her or their issue."

It was contended that the word "issue" really meant "heirs", and that they took an estate tail. But the court considered the word "issue" to be *designatio personæ* and not a word of inheritance. The children were held to take a life estate only.

In *Lucas* v. *Brandreth*, 28 Beav. 274, Sir John Romilly, affirming *Holliday* v. *Overton*, *supra*, again holds that words of inheritance are essential to pass an equitable fee and that the intention of the grantor cannot control.

In that case, by a marriage settlement, real estates were conveyed to trustees and *their heirs*, upon trusts for the parents for life, and afterwards for their children, as the wife should appoint, and in default of appointment by her, for her next of kin. The gift to the next of kin contained no words of inheritance, and following the general rule, it was held that they took a life estate only.

Referring to *Holliday* v. *Overton*, the master of the rolls said (page 280):

In that case as in this, the court felt every disposition to overcome the absence of words of limitation, a disposition caused by a belief that in this, as in that case, the omission of the words of inheritance had been accidental. But it would be making a new settlement, and in substance to alter and reform its provis-

ions, if the word "heirs" or other words of limitation were inserted at the close of the sentence.

The same question again came before the same learned judge in *Tatham* v. *Vernon*, 29 Beav., 604.

In this case Vernon conveyed freeholds to trustees and their heirs in trust, for his wife during widowhood, and afterwards in trust to *convey and divide such estate and premises* amongst the children *and the issue* of their children, who should then be living.

It was held that "issue" must be read "children," and that the children and their issue took life estates only. The court was clearly of that opinion and the reversion was consequently held to be in the settlor's heirs.

In *Marshall* v. *Peascod*, 2 J. & H., 73, the trust, after the failure of issue of the husband and wife named in the settlement, was for the nephews and nieces then living, and the several and respective heirs of nephews and nieces then dead. It was held by Sir W. Page Wood that the nephews and nieces took life estates only, and that the son of a deceased nephew took in fee.

See also, the more recent case of *Middleton* v. *Barker*, 29 L. T. N. S., 643, where an appeal was made to the court to carry out the intention of the settlor, and the court held that he would be striving against the strength of the law if he held the estate to be more than a life estate.

See also 1 Lewin on Trust, 109.

We have referred to the authorities relating to this question rather more profusely than was perhaps necessary; but they show how strongly the rule has become entrenched in the law of real property.

The learned counsel for appellees will, however, direct

the attention of the court to a statute of Nebraska which provides:

> Ch. 73. Sec. 49. The term "heirs," or other technical words of inheritance, shall not be necessary to create or convey an estate in fee simple.

In respect to this statute, as well as to all others which purport to change the ancient laws and rules of real property as they existed at common law, it may be said that it should be construed with the utmost strictness. It was passed, undoubtedly, in view of the ignorance of the laws of real estate that generally prevails in new communities, and for the purpose of affording protection against the lack of knowledge upon the subject of conveyancing.

The language of the statute is peculiar. It does not say that a fee *shall* pass without the word "heirs," but simply that that term shall not be *necessary* to create a fee.

In Illinois the statute provides (Chap. 30, Sec. 13) that every estate granted

> —although other words heretofore necessary to transfer an estate of inheritance be not added, *shall be deemed* a fee simple estate of inheritance, if a lesser estate be not limited by express words, or do not appear to have been granted.

The deed in question was executed by the appellant then a resident of Ohio, where another system of laws prevailed. He was a lawyer by education, and it will be observed that he conveys the estate to John Hilton and *his heirs, forever*. He thus shows an understanding and appreciation of the technical meaning and office of that term.

Now if the statute, which provides simply that that term shall not be *necessary* to pass a fee, is to receive a

strict construction, as it undoubtedly ought, it may be said with some propriety, and with great force, that where a grantor, by the use of the term in one part of a deed, shows his full understanding of the technical meaning of it, the other part of the deed should be construed according to the rules of property prevailing at common law. Indeed, under such circumstances, and under a purely negative statute, there would seem to be no warrant for any other construction.

But, at any rate, this proposition may be advanced without hesitation—that where a grantor, by the use of the term, "heirs," in one part of a deed shows his full understanding of its technical meaning; this understanding will control the construction of another part of the deed unless contrary to an intention clearly and unmistakably expressed.

Tested by this proposition there can be but one conclusion. The court will observe, in the cases cited under this point, conveyances to a grantee "and his *generation*, "to endure so long as the waters of the Delaware shall "run;" to— "and his *lawful representatives;*" to— "and at her death to her *children;*" "the hereby de- "mised estate shall go to and *be vested* in the five chil- "dren and their *representatives;*" "in trust for the chil- "dren of Mary Heathcote, equally to be *divided* between "them share and share alike;" "to every the child or "children of G. D. by his former wife *and their issue* "equally to be *divided* between and amongst them, share "and share alike."

And yet, in each case, a life estate only was held to to pass. And many more similar instances might be cited.

But in the deed to John Hilton the language is simply

"for the *benefit* of my sons, George L., James F. and "Joseph B. Hilton, in equal portion." Here there is no limitation to their "children" or "issue" or "repre- "sentatives" or "generation" or other words indicating succession by inheritance Indeed, and this is very significant, the ordinary and much used word, "forever," indicating perpetuity, is not even used.

There is, in fact a total absence of any expression which forces the conclusion, or from which the conclusion can even be reasonably inferred, that the grantor intended to convey to these three young boys so large an estate as a fee. It was simply for their benefit, they were simply to enjoy the usufruct of the property or the income from the proceeds of it, in equal portions during their lives.

And the theory of Augusta, which she entertained and acted upon without the advice of any one, that the moment the boys attained their majority they were entitled to a conveyance in fee of an undivided one-third, was clearly erroneous. And the conveyance to George L., even if she had been lawfully clothed with the trust estate and the powers under it, was clearly a breach of the trust. For even if the boys be held to have taken an equitable estate in fee, it is perfectly clear that the very object of the conveyance to John was to put the control of the estate in him alone, and not in the beneficiaries; to leave it to the discretion of a mature judgment what to do with the estate and when to dispose of it. Otherwise the appellant might just as well have conveyed to the boys themselves, for they could take the estate, though they could not have disposed of it until their majority. The result of the conveyance by Augusta to George L. was that the immature boy fell into the

hands of designing men, the very result which the father wished to avoid.

In conclusion it is insisted:

1. That the beneficiaries took a life estate only, and that upon the death of George L. the individed one third reverted to the appellant.

2. That the attempts of John Hillon to renounce the trust was a nullity and passed no title.

3. That all the conveyances from him down to Lincoln and from Lincoln to the defendants were void, and that the defendants took no title.

4. That the decree of the lower court should be reversed, with directions to enter a decree confirming the title to the undivided one-third in the appellant.

Respectfully submitted

S. S. Gregory,
William M. Booth and
James S. Harlan,
Solicitors for Appellant.

FILED.
SEP 27 1892
JAMES H. McKENNEY,
CLERK.

No.

THE STATE OF NEBRASKA.

In the Supreme Court.

October Term, 1892.

GEORGE H. HILTON,
Appellant.
vs.
JAMES E. JONES, *et al.*,
Appellees.

TERM NO. 47.

BRIEF OF APPELLEE, JAMES E. JONES AND LOWREY AND SCHMUTTE AND ROCKE.

By N. S. HARWOOD,
JOHN H. AMES,
C. O. WHEDON,
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Calhoun & Woodruff, Printers, Lincoln, Neb.

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STATEMENT OF CASE.

The facts on which the determination of rights of the parties in this suit depend, as they are admitted by the pleadings and established by the unimpeached authority of transcripts from the records the district court of Lancaster county, Nebraska, are as follows:

1st. That on the 26th day of October, 1861, George H. Hilton, being the owner in fee of the lands described in the bill of complaint, conveyed the same by deed as follows: Record, page 15. "Know all men by these presents that George H. Hilton, of Hamilton county, Ohio, in consideration of one dollar and natural love, etc., to me paid by John Hilton, of Madison county, Iowa, receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey to the said John Hilton, and his heirs and assigns forever, in trust for the benefit of my sons, George L., James F. and Joseph B. Hilton, in equal portions, said trustee having authority to sell and convey all or any portions at any time or in any way at his discretion, for their benefit, the following described real estate situate in the territory of Nebraska." Followed by a description of the lands and the following habendum clause: "To have and to hold the same to the only proper use of said John Hilton in trust as aforesaid, his heirs and assigns forever."

2nd. That on the 16th day of September, 1863, said John Hilton, by warranty deed, absolute in its terms and for the expressed money consideration of one thousand dollars, conveyed all of said lands to one Alice B. Hilton, now by marriage Alice B. Ducharme. Record, page 17.

3d. That on the 22d day of November, 1865, the said Alice B. Ducharme, born Hilton, conveyed the said premises to one Augusta H. Hilton. Record, page 18.

4th. And that on the 18th day of May, 1866, George H. Hilton, the grantor in the deed first above mentioned, his wife, Honora Hilton, joining therein, conveyed or assumed to convey, all of said lands by deed, containing the follow-

ing granting clause: "Know all men that George H. Hilton and Honora Hilton his wife, of Cincinnati, Ohio, in consideration of one dollar and natural love and affection, to her paid by Augusta Hilton of the same place, the receipt whereof is hereby acknowledged, do hereby bargain, sell and convey to the said Augusta Hilton, her heirs and assigns forever the following real estate:" Followed by a description of the property conveyed and the following recitation: "This deed is made to perfect the title in Augusta Hilton, as it appears that the deed made by above grantors, dated 26th day of October, 1861, through which title to said land vested in her has not been recorded and has been mislaid or lost." And concluded with the following habendum clause: "To have and to hold the same to the said Augusta Hilton, her heirs and assigns forever," and with the usual covenants of seizin and of warranty. Record, page 111.

5th. That on the 25th day of August, 1871, said George L. Hilton had attained his majority, and that on said day Augusta Hilton, in good faith and for the purpose of vesting the fee in said George L., conveyed to him one undivided one-third part of all said lands, by deed of bargain and sale, executed and delivered in all respects in due form of law; both the said Augusta and the said George L. believing such conveyance to be in conformity with the terms of the above mentioned deeds and in accordance with the intents and wishes of the grantors therein. Record, page 19.

6th. That on the 11th day of September, 1872, said George L. conveyed his undivided one-third of said lands in fee by deed bearing that date to one Smith B. Galey. Record, pages 21-22.

7th. That on the 18th day of September, 1873, the

said Galey, by a warranty deed and for a valuable consideration, conveyed his undivided one-third of said lands to William C. Lincoln, the said George L. Hilton joining in said deed as one of the grantors. Record, page 24.

There are allegations in the bill that these conveyances from George, L. Hilton to Galey, and from Galey to Lincoln, and from the latter to Jones, were for an inadequate consideration, or without consideration, and were procured by fraud, but these allegations are traversed by the answer and unsupported by proof.

8th. That on the 24th day of April, 1874, the district court for Lancaster County in an action then pending therein in which the said William C. Lincoln was plaintiff, and James F. Hilton, Joseph B. Hilton, infants under the age of 21 years, George H. Hilton, (complainant herein) Alice B. Ducharme, Augusta Hilton, Nora M. Lincoln and George L. Hilton were defendants, entered a final decree record, page 122, in which it was recited and adjudged, among other things, that all of said parties, except the infants, had "filed a disclaimer of all interests in the subject matter of the action, and that the plaintiff was the owner of the undivided one-third of all the lands here in controversy in fee." It is not pretended that this decree has ever been appealed from or that any attempt has ever been made to impeach it.

BRIEF.

The statutory provisions having a bearing on the matters in controversy, which were in force at the time the conveyances in question were executed, are found on page 393 of the Compiled Statutes of 1881, and are in the following words:

Section 49– "The term heirs or other technical words of inheritance, shall not be necessary to create or convey an estate in fee simple." Section 50: "Every conveyanc of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms use." The statutory provisions were enacted by the territorial legislature in 1855, and have ever since remained in force.

I.

It is to be observed first that the foregoing statutes apply as well to equitable as to legal estates, for "It is a fundamental proposition that the equitable estates are governed by the same rules as legal estates, otherwise inextricable confusion would ensue." Hence at common law the same words of limitation which were used to create a fee or fee tail in a legal estate were used with like force to create an equitable fee or fee tail in the *cestui qui trust* or *cestui qui use*.

Perry on Trusts, § 357.
Croxall vs. Shererd, 72 U. S., 268.

When, therefore, the statute dispensed with the necessity for the use of these words in the conveyance of legal estates, it made a like dispensation as to equitable, and since a conveyance of land to John Doe without words of limitation is a conveyance of the fee if the grantor had it, so under like circumstances a conveyance to John Doe, "in trust for Richard Doe" vests the latter with the equitable estate in fee.

II.

But the conveyance in the case at bar is not unaccompanied with technical words of inheritance. The language is "do hereby grant, bargain, sell and convey to the said John Hilton and to his heirs and assigns forever, in trust for the benefit of my sons George L., James F., and Joseph B. Hilton," etc., and even at common law it was held that if an estate were devised in this way the *cestui qui trust* took an equitable fee: "For it is plain that the latter is to take an equitable estate as large as the legal estate that passed to the trustee and his heirs, which is a legal fee." This rule is said not to have applied to estates created by deed, but the reason given is significant, viz., because the equitable estate was not limited by words of inheritance, but these words are now dispensed with by statute.

Perry on Trusts, §§ 357 and notes.

It is to be observed, also, that the reason why technical words were held unnecessary in the case of devises was, that in the construction of wills the intention of the testator was held to control, and this was regarded as sufficiently evident without the use of such words. This furnishes a rule of construction under the statute which requires "a contrary intent" to be "reasonably inferred from the terms used" in order to restrict the estate to less than a fee. As though to leave no possible room for doubt as to the intention of the grantor, the above quoted granting clause is followed by the following habendum: "To have and to hold the same to the only proper use of the said John Hilton, in trust as aforesaid, his heirs and assigns forever."

Even in the absence of our statute, and where the stat-

ute of uses is held to be in operation, this limitation of a use upon a use is held to convey the legal estate in fee to the trustee and to create and equitable estate in fee in the *cestui qui use*.

Perry on Trusts, §§ 300–301 and notes.

It is very clear to us that under the foregoing statutes and authorities such was the effect of the deed from George H. Hilton to John Hilton.

III.

If the foregoing conclusions are correct they effectually dispose of the claim of complainant, George H. Hilton. But there are certain other considerations equally conclusive as to his claim, which may as well be treated of here. After the conveyance by John Hilton to Alice B. Hilton, and by Alice B. to Augusta Hilton, to-wit; on the 18th day of May, 1866, George H. Hilton and his wife united in a deed of all these lands to Augusta. Record page 111. This deed differs in form from the ordinary warranty deed only by the insertion of this clause, "This deed is made to perfect the title in Augusta Hilton, as it appears the deed made by above grantors, dated 26th day of October, 1861, through which title to said lands vested in her has not been recorded and has been mislaid or lost." What this deed was which is recited to have been mislaid or lost, the record does not disclose. No such misadventure appears by proof to have ever happened to any of the deeds in evidence, and as this deed purports to convey the fee simple title, and the presumption is that it was executed by the same grantors and to the same grantee as the lost deed, the presumption

also is that the former conveyed the same estate as the latter, viz, the fee title, which the former is asserted to be intended "to perfect" in Augusta. Hence, if it could be pretended that the deed to John Hilton left any remainder or reversion in George H., the same was conveyed away by these deeds to Augusta. So that whatever the construction of the trust deeds may be, Augusta acquired the fee. Complainant contends, in the absence of proof, that the deed from George H. to John is the one recited to have been lost, but this is in contradiction of the recital, which is, that the lost deed was by the same grantors as that of May, 1866. In the latter deed, however, Honora Hilton is one of the grantors, but in the deed to John she is not. George H. is therefore estopped to deny the conveyance of his entire estate in the lands to Augusta.

IV.

It may be added here, that the claim of George H. to succeed to one-third of the lands in controversy as heir-at-law of his son George L., is curiously inconsistent with his claim that the equitable estate created by the deed to John Hilton was an estate for life only. If that was the case, then when George L. died the estate terminated and nothing remained for the statute of decents to operate upon. If, on the other hand, it was an estate in fee, George L. conveyed t in his life-time and the inheritance was cut off. No one will dispute that an equitable estate may be conveyed in all respects like a legal one.

Perry on Trusts, § 321.

Washburn on Real Property, 3rd ed., 455-456.

V.

If the deed from George H. to John Hilton created an estate for the lives of the *cestuis qui trust* only, leaving a remainder in fee in the donor, as is sometimes contended by the complainant, two things have since occurred, either of which is sufficient to cut off the remainder in George H. and vest it in the appellee.

1st. The deed in fee from George H. and his wife to Augusta Hilton. Record, page 111.

2nd. The decree of the district court of Lancaster county, Nebraska, Record page 122, in which it is found that George H. Hilton with others had filed a disclaimer of any interest in the estates in question, and in which it was adjudged, without objection or exception, that William C. Lincoln, the immediate grantor of the appellees, was the owner of this undivided one-third of the lands in fee. "We are bound to presume that when the question arose in the state court it was thoroughly considered by that tribunal, and the decision rendered embodied its deliberate judgment thereon."

Cross vs. Allen, 141 U. S., 528–539.

VI.

But in our opinion the foregoing discussion is unnecessary. The bill alleges, Record page 80, that on the 16th day of September, 1877, George L. Hilton died intestate, without having been married and without living issue, and the complainants claim, whether as remainderman or heir-at-law, rests, of course, upon the truth of these averments.

Their truth is not admitted by the answer of any defendant claiming title under Lincoln and the answers of Jones and of others of said defendants conclude with a general traverse. There is an utter absence of proof upon the point and neither said defendants nor their counsel have any knowledge as to the fact. The bill is not one for discovery, and the alleged facts, if they exist, are not such as the defendants may presumed to be informed of, but are peculiarly within the knowledge of the complainant. The decree of the circuit court, (Record page 143,) is one dismissing the bill generally, and is correct for the reasons stated in this paragraph alone! No exceptions were taken to the answer under the 61st rule, but it was met with a general replication, (Record page 113) nor was the answer subject to exception.

"If the answer neither admits nor denies the allegations of the bill, they must be proved upon the final hearing."—Chief Justice Marshall in Young vs. Grundy, 6 Cranch U. S. S. C., 51. Mr. Justice Clifford in Brown vs. Pierce, 7 Wallace, 211: "The general denial of all the matters in the bill not before answered, with which the answer usually concludes, is sufficient as a pleading to put the several matters in the bill in issue." Stafford vs. Brown, 4 Paige, Chancery N. Y., 88–90. See also Smith vs. The St. Louis Mutual Life Insurance Company, 2nd Tennesee Chancery, 599–601, where these and many other decisions are cited and commented upon and the reasons for the rule elucidated.

The answer in this case has no office to fill except that of a pleading, and the general traverse alone enables it to

fill that office by putting in issue all the allegations of the bill not specifically answered.

Miller vs. Avery, 2nd Barb. Chancery, 590.

The contrary rule prevails, if at all, only in cases in which the bill is filed for discovery and an answer under oath is not waived.

It is not pretended that the decree of the state court rendered more than eighteen years since has ever been reversed or modified. That decree was rendered by a court of general jurisdiction in a suit to which not only the appellant here but also his son, George L. Hilton, whose heir the appellant claims to be and under whom he claims title to the lands in controversy, were parties. In that suit both the appellant, George H. Hilton, and his son George L., appeared and filed disclaimers of all interest in the lands in controversy, being the same lands described in the bill in this suit. The state court specifically found that William C. Lincoln, the grantor of the appellees now owning the land, was the owner in fee of the premises which the appellant now seeks to recover. With that finding and decree both the appellant and his son, George L., were satisfied, for they took no exception thereto nor did they seek to have that judgment reviewed. The appellant now seeks to attack the judgment of the state court collaterally. If this were permissible, yet the appellant must fail because he offered no testimony in support of the allegations of his bill. He is not even sworn as a witness in his own behalf. It is to be noticed that the only testimony offered by the appellant in support of the allegations of his bill are copies of depositions taken, not in this suit but in suits pending in the

district court of Lancaster county, Nebraska, to which suits neither of the appellees submitting this brief were parties. Neither of these copies of depositions were admissible as evidence against these appellees. They were not a part of the record of the state court for they had not been made such by bill of exceptions.

Not only is the decree of the state court in force but the supreme court of Nebraska, in the case of Hilton vs. Bachman, 24 Nebraska, 490, held that this appellant was bound by that judgment. In that case George H. Hilton, the appellant here, instituted his suit in the state court against the heirs of John Bachman (the same John Bachman who was made a defendant in this suit), John Hilton, Augusta Hilton, appellees here, and others seeking to recover one-third of certain lands covered by the decree of the state court hereinbefore referred to, as the heir at law of his son George L. Hilton. In that suit the appellant here, plaintiff there, embodied substantially the same allegations in his petition as are contained in his bill filed in this case. In fact he took a printed copy of his bill in this case and with some changes filed it in the state court, a form of pleading not customary under the code of Nebraska. The supreme court of the state embodied in its opinion a copy of the same decree that appears at page 122 of the printed record in this case. Referring to this decree the court in the opinion, page 504, say:

"But it is contended that there is no proof that William C. Lincoln was the owner of the undivided one-third of this real estate at the time of the execution of the mortgage to Bachman, and it is insisted that this portion of the title was not thereby encumbered. We are unable to find such

deed in the record, but we find that, in the petition in the case of William C. Lincoln against James F., Joseph B. and George H. Hilton and others, it is alleged that Lincoln was the owner of the two-thirds interest in the real estate which he held in trust for James F. and Joseph B., the conveyance of the real estate having passed through George H. Hilton and S. B. Galey to himself. In that action a decree was prayed for confirming his ownership in fee of the one-third interest which the plaintiff George H. Hilton now claims. The decree of the court was in accordance with the prayer of that petition, and after a finding that Lincoln held the title to the undivided two-thirds in trust for James F. and Joseph B. there was an express finding that he (Lincoln) was "the owner in fee of the other undivided one-third" of the land.

"Plaintiff was a party to that action. He was satisfied with that decree at the time it was made. The court had jurisdiction over him, as well as of the subject matter. He took no steps to have the decree reviewed, modified, or set aside. All presumptions are in favor of the regularity of that proceeding. We must presume that the district court which rendered the decree did so upon ample proofs of title, and that the decree being still in full force is binding, and settles the question of title."

This decision of the supreme court of Nebraska as to the force and effect of the decree of the district court of that state ought to be decisive of this case.

VII.

This case was submitted to the circuit court by stipulation dated November 25, 1886 (record page 140). At this

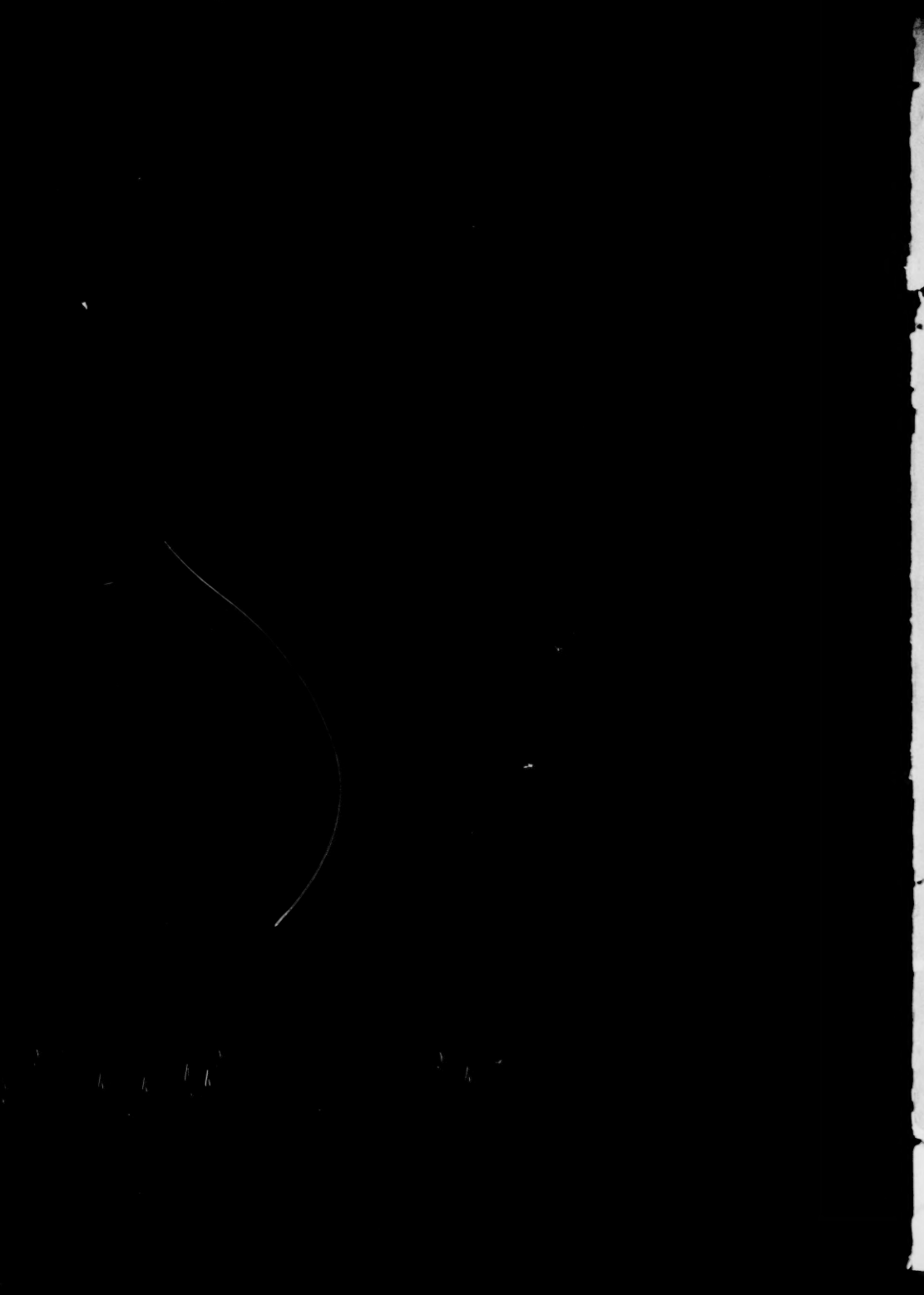
time no replications had been filed to the answers of Jones, Schmutte, or Lowrey. On Januory 4, 1887, without leave af court, and after the submission of the case, replications were filed to the answers of Schmutte and Lowrey; and on January 25, 1887, without ieave of court, replication was filed to the answer of Jones. No replication was ever filed to the answer of Rocke.

The allegations of these answers not being denied by replication, they stood as admitted.

For the toregoing reasons we conclude that the decree of the circuit court dismissing the bill was right and that it ought to be affirmed.

N. S. HARWOOD,
JOHN H. AMES,
Solicitors for James E. Jones.

CHAS. O. WHEDON,
Solicitor for Lowrey, Schmutte and Rocke.



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We confess our inability to understand how the principles and authorities recited in the brief of appellant's counsel tend to support the conclusions to which they urge the court to arrive, even although the Nebraska statute, one sentence

of which they quote, should be brushed away as of trivial importance. Their remarks concerning this statute are peculiarly felicitious. They accomplishing what Edmund Burke supposed to be impossible, the indictment of a whole people. We are quite willing to admit the ignorance of people living west of Chicago, and especially of those living west of the Missouri river, of the laws of real estate, and of most things of consequence, but as this statute was borrowed almost literally from the revised statutes of New York, which were prepared by a commission composed of some of the most eminent lawyers of that state, its enactment does not alone amount to conclusive proof that the people of Nebraska are incapable of self-government. In order that there may be no mistake as to the scope or intent of this statute, we quote it again: it is as follows:

Sec. 49, Compiled Statutes, 1891, page 393:

"The term heirs or other technical words of inheritance shall not be necessary to create or convey an estate in fee simple."

Sec. 50. "Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the term used."

This language is supposed in Nebraska to be wholly free from ambiguity, and therefore to offer no opportunity for interpretation. "Unless a contrary intent can be reasonably inferred fr m the terms used," any deed, say a quit claim deed, passes all the interest of the grantor, and if he had a fee, it conveyes the fee.

Now, it is not doubted that the appellant, prior to his

conveyance to John Hilton, owned the lands in fee, and so far is the intent to convey less than a fee, from being inferible from any of the terms of this instrument, that the intent to pass the whole title is expressed by the limitation to the grantee, "his heirs and assigns forever." We shall continue to indulge the presumption therefore, that by this deed appellant divested himself of his entire estate in the land. Where did it go? Most unquestionably the equitable estate in fee went to the *cestuis que trust*, and equally without question, as it seems to us, the legal estate in fee went either to the three boys, or to John Hilton, the trustee, because, among other reasons, there was no where else it could go. "For it is plain," says Mr. Perry, "that the former are to take an equitable estate as large as the legal estate that passed to the trustee and his heirs which is a legal fee."

Perry on Trusts, paragraph 357. As this proposition has never to our knowledge been disputed or questioned, we do not deem it necessary to cite further authority in its support. If we are right so far, then nothing that John Hilton or any of his grantees could do, could affect the estate of the boys; but whoever took the legal title from him, his deed from appellant being of record, took it with constructive notice of, and subject to their equitable title in fee; so that the recitals of the trust in the deeds to Alice and Augusta were mere surplusage; but the idea that John and his grantee, and the grantee of his grantee, could not convey the legal title, if he had any, subject to this equitable right, is as destitute of legal precedent in its support, as that the Nebraska statute having been enacted because of the ignorance of the Nebraska population, may properly be disregarded by persons of superior intelligence.

It is said in Perry on Trusts, paragraph 321-347, that the legal estate in the hands of a trustee, possesses the same incident and properties as if he were the beneficial owner, and hence he may convey it by deed or will, and it descends to his heirs, subject to the trust in all respects, as in the case of other estates. As this proposition also appears to be wholly uncontradicted by judicial authority, we have not thought it necessary to multiply citations in its support.

The legal estate, therefore, came regularly and lawfully to Augusta, and was further fortified, as counsel for appellant contend, by the deed from appellant and wife to her, of date August 30th, 1867. The contention, therefore, that the deed from John Hilton to Alice was void, or that he retained any interest, legal or equitable, rendering him a necessary or proper party to any proceeding affecting the title to this land, is a solecism.

Granting now, for the sake of argument, what we contend is not the fact, that the deed of an undivided one-third by Augusta to George L. Hilton, when the latter attained his majority, was inoperative to convey to him the legal title, still it did not deprive him of his equitable estate, nor of the power of disposition over it. We suppose that when George L. attained his majority, he acquired the full right and power of disposition of all his estates and properties, equitable as well as legal, to the same extent as other persons of mature years, and that one of the estates which he thus acquired the right to dispose of, was his equitable estate in these lands, which was the whole beneficial interest in an undivided third of them. This power he exercised by the conveyance to Galey, and by joining Galey in the

deed to Lincoln. The estate thus conveyed beingafterwards conveyed by the latter to the appellees. The deeds executed by George L. did not, to be sure, specify the equitable estate, but they purported to convey the whole title, and hence under the operation of the Nebraska Statute, conveyed all his interest in them, and besides, equitable estates in the absence of the statute, are governed by the same rules, and descend and are conveyed in the same manner as the legal.

Perry on Trusts, paragraph 102.

The statute in force in Nebraska at the times the several conveyances were made, provides, Section 1, Chapter 73, page 645, compiled statutes of 1891: "Deeds of real estate, or any interest therein in this state, except leases for one year or for a less time, if executed in this state, must be signed by the grantor or grantors, being of law age, in the presence of at least one competent witness, who shall subscribe his or her name as a witness thereto, and be acknowledged or proved, and recorded as directed in this chapter."

Section 46: "The term deed as used in this chapter, shall be constructed to embrace every instrument in writing by which any real estate or interest therein is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected at law or in equity, except last wills, and leases for one year or for a less time." Hence, undoubtedly, the method adopted by George L. was the proper one for conveying his equitable estate or interest in these lands. If, however, the deed from Augusta to George L. was inoperative to convey the legal title to the latter, it was so only

because it became vested in him immediately upon the execution and delivery of the deed by George H. to John. This latter instrument conveyed to John in trust for the immediate use and benefit of the boys, without any intervening estate for life or years, and without the imposition of any duty upon the grantee. He had "authority" merely, "to sell and convey all or any portion at any time, or in any at his discretion, for their benefit;" but he was not required so to do, or charged with the expenditure or re-investment of the proceeds, but was attempted to be made the donee of a mere naked power, without any interest, and one which he might exercise or not, at his own discretion. In such case the law executes the use, and vests the whole estate, both legal and equitable, in the person beneficially interested.

Perry on Trusts, Paragraph 298.

Whether the statute of uses is in force in Nebraska, the courts of that state have never been called upon to decide: but the statute provides, chapter 15, page 283, compiled statutes of 1891: "So much of the common law of England as is applicable and not inconsistent with the constitution of the United States with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory, is adopted and declared to be law within said territory." As Mr. Perry says in a note to paragraph 290 of his work, the statute is treated as in force in most of the states as a part of the common law; but if the statute of uses is not in force still, independently thereof, a simple, naked or dry trust, such as was here created, imposes upon the trustee the duty to convey the legal estate as the *cestuis que*

trust may direct, and to convey to the latter, if requested, and equity will compel the performance of this duty.

Perry on Trusts, Paragraph 520.

It seems to us it cannot be doubted that when George L. Hilton attained his majority, he became at once entitled, if the statute had not executed the use, to call for a conveyance from the trustee, and if necessary, obtain the aid of a court of equity to compel it. Otherwise the legal and equitable estates would have remained separated forever, the former in John Hilton and his heirs and grantees, and the latter in George L. and his heirs or grantees. It can hardly require the citation of authorities in support of the contention that such a state of the title to real estate, is contrary to the policy of the laws, both of the several states and of England.

II.

Counsel for appellant devoted a large space to the criticism of the proceedings and judgment in the state courts, which tribunals appear to be, in their estimation, as lamentably ignorant of the laws of real property and conveyancing, as are the legislature and the rest of the population. We do not see how that discussion is pertinent to this controversy beyond the fact that appellant and his son George L. were parties to that suit, and filed disclaimers therein, thus submitting their claims to the operation of a judicial estoppel, which the supreme court of the state has held in the case of Hilton vs. Buchman, cited in our former brief, to be conclusive upon the appellant. In the absence of proof we do not suppose that the vociferation of counsel to the

effect that these disclaimers were fraudulent or unauthorized, calls upon us for an answer. So far as the trust estates involved in that case are concerned, however, the court had before it both the person holding the legal title, and all the *cestuis que* trust, so that nothing seems to have been lacking with respect to its jurisdiction over either the persons or the subject matter.

III.

It seems to us, however, that more learning, such as it is, and we admit that our contribution is somewhat defective, has already been expended on this case than is warranted by the nature of the questions actually involved. The case in a nutshell, as we understand it, is this: Appellant by his deed to John, conveyed at least the whole beneficial title to this undivided third to his son, George L., at least for life, and the whole legal title either to John or George L. Suppose there was left in the appellant by this deed, a remainder or reversion of either the legal or equitable estate, or both, this remainder or reversion was certainly conveyed to Augusta by the full covenant warranty deed of August 30, 1867, by George H. and his wife to Augusta. Whatever may have been the case as to the so-called trust estate in John or the equitable estate in George L., there was nothing to prevent Augusta from conveying this remainder or reversion to the latter, nor from its being conveyed by George L. to Galey, or by Galey to Lincoln, and by Lincoln to the appellees. Such conveyance the deeds set out in the record certainly accomplished, even if they accomplished nothing else. Now, suppose the equitable estate of George L. to have been for life only, and suppose him to be dead,

which latter fact is denied and not proved, then upon the termination of the equitable estate for life, it merged with the legal estate in remainder, or otherwise, which is not in George H., but in the appellees. Whatever estate of inheritance George L. had, was conveyed in his lifetime, so that appellant cannot claim as his heir. Whatever estate in remainder or reversion was left in appellant by the deed to John, the former conveyed to Augusta. It is immaterial, therefore, whether the equitable estate was for life or in fee, or whether the deed from John to Alice, or any other deed, not executed by appellant, was valid or void, or whether the Nebraska court had jurisdiction or not, or whether or not the proceedings therein operate by way of estoppel, or whether or not appellees have any title, legal or equitable, the fact is incontrovertible that the appellant has none, and that is a sufficient reason why the decree of the circuit court dismissing his bill, should be affirmed.

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